Supreme Court, U.S.
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No. 96-318

In The

Supreme Court of the United States

October Term, 1996

DARYLL RICHARDSON, and JOHN WALKER,

Petitioners,

vs.

RONNIE LEE McKNIGHT,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

BRIEF OF PETITIONERS

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I. QUESTION PRESENTED

Are private parties serving as quasi-public correctional officers in a privately managed prison facility performing traditional police power functions on behalf of the State of Tennessee, historical powers and functions exclusively reserved to the sovereign that can only be carried out by the State and delegated to their employer, a private for profit corporation as expressly authorized by statute and executed by contract:

1. state actors subject to liability under 42 U.S.C. § 1983 for conduct committed under color of law; and

2. therefore entitled to the defense of qualified immunity in an action for damages brought under 42 U.S.C. § 1983 by a prison inmate in their custodial charge for discretionary acts undertaken while fulfilling their statutorily and contractually defined duties as required by the Tennessee Department of Corrections?

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BRIEF FOR PETITIONERS[1]

II. OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported at 88 F.3d 417 (6th Cir.1996). The opinion of the United States District Court for the Middle District of Tennessee is not reported. Both opinions are reproduced in the Appendix to the Petition for Writ of Certiorari filed herein. (Pet. App. 1-37) The district court's opinion herein incorporates its prior decision denying qualified immunity to private correctional officers employed by the Corrections Corporation of America. *Manis v. Corrections Corporation of America*, 859 F.Supp. 302 (M.D.Tenn.1994) (Higgins, J.).

III. JURISDICTION

The final judgment of the United States Court of Appeals for the Sixth Circuit was entered on July 10, 1996. (Pet. App. 1) The petition for writ of certiorari was filed with this Court within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). On November 27, 1996 this Court issued an order granting the petition for writ of certiorari to review the final judgment entered by the United States Court of Appeals

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[1] Pursuant to Supreme Court Rule 29.6 petitioners disclose that they are correctional officers employed by the Corrections Corporation of America (CCA) of Nashville, Tennessee. CCA is underwriting petitioners' defense of this action. Thus, a favorable ruling by the Court could end CCA's further expenditure of petitioners' defense.

for the Sixth Circuit denying petitioners qualified immunity. 117 S.Ct. 504.

IV. STATUTORY PROVISIONS INVOLVED

"The Civil Rights Act of 1871," Rev.Stat. § 1979 as amended, 42 U.S.C. § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.
>
> For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

"The Private Prison Contracting Act of 1986", as amended, T.C.A. § 41-24-101 et seq. is reproduced in the Appendix to the petition for writ of certiorari filed herein. (Pet. App. 50-64)

V. STATEMENT OF THE CASE

The "privatization"[2] of prison facilities has developed as a critical and creative response by government to

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[2] "Privatization" is defined as government reliance on the private sector rather than directly on government agencies for the performance of public functions. The first apparent use of

the exponential problem of institutional overcrowding and the attendant rising costs of providing correctional and other related inmate services traditionally provided by the State as an exclusive public function of the sovereign.

By 1997, at least 22 of the several states had enacted enabling statutory schemes authorizing the state and its political subdivisions to contract with the private sector to provide comprehensive correctional services to inmates confined under the criminal justice system which today is very much a permanent and growing fixture of the governmental and political landscape.[3] In 1986, the

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the term was published in P. Drucker, *THE AGE OF DISCONTINUITY* (1969). E.S. Savas, *Privatization and Prisons*, 40 VAND. L. REV. 889, n.1 (1987). The term has also been broadly defined as the "attainment of any public policy goal through the participation of the private sector." National Commission for Employment Policy, Privatization and Public Employees: The Impact of City and County Contracting Out Government Workers 7 (May 1988). C. Thomas, *Resolving the Problem of Qualified Immunity for Private Defendants in Section 1983 and Bivens Damage Suits*, 53 LA. 449, n.1 (1992). *See generally*, Symposium, *Privatization, the Assumptions and the Implications*, 71 MARQUETTE L. REV. 445 (1988); C. Thomas & L. Hanson, *The Implications of 42 U.S.C. § 1983 for the Privatization of Prisons*, 16 FLA. ST. U.L. REV. 933 (1989).

[3] *See*, ALASKA STAT. § 33.30.031(a) (1995); ARIZ. REV. STAT. § 41-1609.02 (1996); ARK. CODE ANN. § 12-50-106 (1995); COLO. REV. STAT. § 17-27-104 (1996); FLA. STAT. ANN. §§ 957.01-.14 (1995); KAN. STATUTE ANN. § 76-3002 (1995); KY. REV. STAT. ANN. § 197.505(1) (1991); LA. REV. STAT. ANN. § 1800.4(A) (1996); MISS. CODE ANN. § 47-5-1203 (1996); MONT. CODE ANN. § 53-30-106(3); N.C. GEN. STAT. § 148-37(c) (1996); N.M. STAT. ANN. § 33-1-17 (1990); OKLA. STAT. ANN. § 57-504(7) (1996); PA. STATUTES § 61-1084 (1996); S.D. CODIFIED LAWS ANN. § 24-11-39 (1995); TENN. CODE

Tennessee legislature, responding to the need to experiment with alternatives to the exclusive state management and operation of correctional services, enacted enabling legislation entitled "The Private Prison Contracting Act of 1986", T.C.A. § 41-24-101 et seq. The Act specifically authorizes the Tennessee Commissioner of Corrections to enter into formal agreements for the management and operation of correctional facilities and correctional services with private sector prison contractors to state confined inmates placed by the Tennessee criminal courts in the custody and control of the Tennessee Department of Corrections. T.C.A. § 41-24-103.

The preamble of the original Act unambiguously states the experimental nature of the Act and authorizes the Tennessee Commissioner of Corrections:

> [T]o contract with private concerns on a limited basis to afford the opportunity to determine if savings and efficiencies can be effected for the operation of correctional facilities and at the same time insure that the interests of the state citizens and employees can be fully protected.

1986 Tenn. Pub.Acts ch. 932.[4]

ANN. § 41-24-101 (1995); TEX. GOV'T. CODE ANN. § 494.001(a) (1990); UTAH CODE ANN. § 64-13-26 (1993); VA. CODE ANN. § 53.1-262 (1995); W. VA. CODE §§ 25-5-1 to-20 (1995); WIS. STAT. ANN. § 301.08(1)(b) (1991); WYO. STAT. § 7-18-104 (1995).

[4] *See generally*, W. Cody & A. Bennett, *The Privatization of Correctional Institutions: The Tennessee Experience*, 40 VAND. L. REV. 829 (1987). *See also*, I. Robbins, *The Legal Implications of Private Incarceration*, 38 AMER. U. L. REV. 531 (1989).

Under the Tennessee Act "correctional services" are defined broadly to include the following public functions, services and activities within the prison:

> (A) Education, training and job programs;
>
> (B) Recreation, religious and other activities;
>
> (C) Development and implementation assistance for classification, management information systems or services;
>
> (D) Food services, commissary, medical services, transportation, sanitation or other ancillary services;
>
> (E) Counseling, special treatment programs, or other programs for special needs; and
>
> (F) Operation of facilities, including management, custody of inmates, and providing security;

T.C.A. § 41-24-102. (Pet. App. 50)

In 1984, petitioners' employer, the Corrections Corporation of America (CCA), opened its first privately managed adult facility for Hamilton County, in Chattanooga, Tennessee.[5] Today CCA is the largest developer and manager of privatized correctional and detention facilities worldwide. CCA's facilities are located in 11 states and the Commonwealth of Puerto Rico, Australia and the United Kingdom. As of May 30, 1996 CCA had

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[5] *See*, D. Wecht, *Breaking the Code of Deference: Judicial Review of Private Prisons*, 96 YALE L.J. 815, 816-18 (1987) for a brief history of the development of private prisons in England and the United States.

contracts to manage 49 correctional facilities and detention centers with an aggregate design capacity of 33,153 beds in 37 facilities representing 20,994 beds in operation. CCA is currently developing 12 additional facilities and expanding four facilities representing an additional aggregate of 12,159 beds when completed. CCA expects that all of the beds under development will be in operation by the end of 1997. CCA owns 12 of the 37 facilities it currently operates and leases the remaining 25 facilities from governmental agencies and other non-profit corporations.

Throughout the United States there is a growing trend toward privatization of governmental services and functions, including corrections and detention, as government faces continuing pressure to control rising costs and improve the quality of services. According to a 1995 census of private adult correctional facilities the design capacity of quasi-public managed adult correctional and detention facilities worldwide has increased dramatically since CCA opened its first facility in Tennessee in 1984.[6]

The majority of this growth has occurred since 1989 as the number of quasi-publicly managed facilities worldwide increased from 26 facilities to 92 facilities with a design capacity of 63,595 beds in 1995.[7] According to the 1995 census, privately managed facilities are operated

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[6] The census was prepared by the Private Corrections Project, Center for Studies in Criminology and Law, University of Florida, Gainesville, Florida. *Private Adult Correctional Facility Census*, pp. ii-iii (Ninth Edition March 1996).

[7] *Corrections Corporation of America, Annual Prospectus* at 3 (May 31, 1996).

under contract with the Immigration and Naturalization Service and United States Marshall detention facilities as well as state prisons, community correction facilities, intermediate facilities, pre-release centers, work program, work release/halfway facilities privatized by state agencies, county and city jails and transfer and juvenile offender facilities.

Respondent Ronnie Lee McKnight is a state inmate in the custody of the Tennessee Department of Corrections. Following respondent's sentencing to the custody of the Tennessee Department of Corrections respondent was designated to be confined at the South Central Correctional Center (SCCC), Clifton, Tennessee, a facility managed and operated under a contract entered into by the Tennessee Commissioner of Corrections and the Corrections Corporation of America (CCA). (Pet. App. 44-48)

CCA operates several of Tennessee's prisons pursuant to contract and its employees act under the authority of the Private Prison Contracting Act of 1986, T.C.A. § 41-24-101 et seq. *Manis v. Corrections Corporation of America*, 850 F.Supp. 302, 303 (M.D.Tenn.1994). By contract the State of Tennessee has delegated to CCA and its quasi-public correctional officers, historical police powers and traditional public functions exclusively reserved to the sovereign to provide comprehensive correctional services to prisoners sentenced by the Tennessee criminal courts in the custody and confinement of the Tennessee Commissioner of Corrections.[8] The Act expressly prohibits the delegation of specific powers and duties to

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[8] In addition, T.C.A. § 41-24-107(b) provides that the defense of sovereign immunity is unavailable to private

private contractors in the areas of inmate parole, release, work release and furloughs, calculating good time credits, levels of restrictive custody and disciplinary actions. These powers are expressly reserved to the Tennessee Commissioner of Corrections. T.C.A. § 41-24-112.

On March 3, 1994, respondent McKnight filed the instant action for $400,000 in compensatory and punitive damages under 42 U.S.C. § 1983 in the United States District Court for the Middle District of Tennessee against John Rees,[9] the warden of the South Central Correctional Center (SCCC) and two of its correctional officers, Daryll Richardson and John Walker. *McKnight v. Rees*, No. 1-94-0042 (M.D.Tenn.) (Pet. App. 23-37).

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contractors. The issue of state sovereign immunity is a matter of Tennessee law and is not before the Court. These petitioners claim the availability of the defense of qualified immunity which is entirely a matter of federal law under 42 U.S.C. § 1983. *Martinez v. California*, 444 U.S. 277, 284 n.8 (1980) (state sovereign immunity is not applicable to § 1983 action in state court); *Felder v. Casey*, 487 U.S. 131 (1988) (§ 1983 action preempts state immunity law). *See also* S. Steinglass, *The Emerging State Court § 1983 Action: A Procedural Review*, 38 U. Miami L. Rev. 381, 475 (1984); S. Steinglass, *Section 1983 Litigation in State Courts* § 15.2(b), § 15.3 (Clark Boardman 1987). Even in the absence of this statutory provision it is doubtful under any legal theory that private contractors such as CCA, could ever claim a sovereign immunity defense under either Tennessee or federal law. *See Owen v. City of Independence*, 445 U.S. 622 (1980) (municipal corporations not entitled to immunity defense even when municipal official acted in good faith).

[9] Warden John Rees was subsequently dismissed from the case. Respondent McKnight did not appeal the dismissal. (Pet. App. 2) Accordingly, Warden Rees is not before the Court.

Respondent's complaint alleges that his right to be free from cruel and unusual punishment under the Eighth Amendment of the United States Constitution was violated when he was subjected to excessively tight restraints which caused him severe bodily injury during his transport on September 13, 1993 from the Tennessee Reception Center, Nashville, Tennessee to SCCC, Clifton, Tennessee. The complaint alleges that the restraints caused him extreme pain and swelling which resulted in his hospitalization. It is further alleged that when he complained to petitioners Richardson and Walker about the restraints, his pleas were deliberately ignored, and that he was taunted by them and that said conduct of the officers amounted to deliberate indifference of his medical needs, rights arising under the Eighth Amendment. (Pet. App. 44-48); *Estelle v. Gamble*, 429 U.S. 97 (1976); *Farmer v. Brennan*, 511 U.S. 825 (1994).

On December 2, 1994 petitioners filed a motion to dismiss respondent's complaint asserting that as private persons acting under color of law and performing exclusive public functions as correctional officers delegated to their employer CCA by the Tennessee Department of Corrections by contractual agreement, they were entitled to the defense of qualified immunity in the same manner as their state employed counterparts as recognized by this Court in *Procunier v. Navarette*, 434 U.S. 555, 561-62 (1978). (Pet. App. 3)

On March 1, 1995, the district court denied the motion to dismiss, holding that petitioners Richardson and Walker, private persons employed as quasi-public correctional officers by a private, for profit corporation were not entitled to avail themselves of the defense of

qualified immunity. (Pet. App. 23-24) The district court relied on its previous decision in *Manis v. Corrections Corporation of America*, 859 F.Supp. 302 (M.D.Tenn.1994) (Higgins, J.).

On March 6, 1995, petitioners filed a timely interlocutory appeal to the United States Court of Appeals for the Sixth Circuit as provided under *Mitchell v. Forsyth*, 472 U.S. 511 (1985); *Johnson v. Jones*, 115 S.Ct. 2151, 2156 (1995); *Behrens v. Pelletier*, 116 S.Ct. 834 (1996). (Pet. App. 2) The jurisdiction of the court of appeals was invoked under 28 U.S.C. § 1291.

On July 10, 1996, the Sixth Circuit affirmed the district court's denial of petitioners' motion to dismiss the respondent's complaint, holding that the defense of qualified immunity was unavailable to private persons acting under color of law under this Court's decision in *Wyatt v. Cole*, 504 U.S. 158 (1992). (Pet. App. 7-8)

On August 26, 1996, petitioners filed a timely petition for writ of certiorari with this Court. On November 27, 1996, the Court granted the petition for writ of certiorari. 117 S.Ct. 504.

VI. SUMMARY OF THE ARGUMENT

Private parties acting as quasi-public correctional officers under government contract, performing essential traditional and *exclusive* public functions that can only be carried out by the sovereign and therefore reserved to the State, on behalf of and for the benefit of the State, vital services that require the exercise of discretion, to prison inmates placed in their custodial charge satisfy the state

action requirement of the Fourteenth Amendment and such conduct constitutes action under color of law under 42 U.S.C. § 1983. *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974); *West v. Atkins*, 487 U.S. 42 (1988); *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982).

Qualified immunity advances the effective performance of vital and necessary governmental functions. It is no concern whether the governmental functions actually performed are undertaken by public officials or by private sector parties acting under contractually delegated authority on behalf of the sovereign as quasi-public correctional officers exercising custodial authority over state prisoners entrusted to their charge by the State. *West v. Atkins*, 487 U.S. 42 (1988).

Just as qualified immunity protects federal and state employed correctional officials from vexatious litigation and promotes the effective administration of vital law enforcement and correctional functions by promoting the exercise of discretion by governmental officials and reducing the societal costs of litigation, the extension of qualified immunity to quasi-public correctional service providers advances the same public interest objectives necessary for the proper, effective and just administration of core and vital governmental powers and functions. Thus upon sifting the facts and weighing the unique and particular circumstances presented in this case by applying historic public function analysis, the Court must inevitably conclude that qualified immunity should be afforded to quasi-public correctional officers to the same extent enjoyed by their federal and state employed professional counterparts. *Procunier v. Navarette*, 434 U.S. 555 (1978); *Cleavinger v. Saxner*, 474 U.S. 193 (1985).

VII. ARGUMENT

I.

PRIVATE STATE ACTORS SERVING AS QUASI-PUBLIC CORRECTIONAL OFFICERS IN A PRIVATELY MANAGED PRISON FACILITY PERFORMING TRADITIONAL AND HISTORICAL POLICE POWER FUNCTIONS UNDER COLOR OF LAW ON BEHALF OF THE STATE OF TENNESSEE, UNIQUE FUNCTIONS AND POWERS EXCLUSIVELY AND UNIQUELY RESERVED TO THE SOVEREIGN AS EXPRESSLY DELEGATED TO THEIR PRIVATE EMPLOYER BY CONTRACT AS AUTHORIZED BY STATE LAW, ARE ENTITLED TO ASSERT THE DEFENSE OF QUALIFIED IMMUNITY IN AN ACTION FOR DAMAGES BROUGHT UNDER 42 U.S.C. § 1983 BY A PRISON INMATE PLACED IN THEIR CUSTODIAL CHARGE FOR DISCRETIONARY ACTS UNDERTAKEN WHILE FULFILLING THEIR STATUTORILY AND CONTRACTUALLY DEFINED DUTIES

This case raises an important fundamental and core question of federal law regarding the availability of the qualified immunity defense in litigation arising under 42 U.S.C. § 1983. This action for damages is brought by a prison inmate in the custodial charge of quasi-public[10]

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[10] The term "quasi" in legal phraseology applies when one subject resembles another with which it is compared, but there exists intrinsic and material differences between them. *BLACKS' LAW DICTIONARY* at 1245 (Sixth Edition 1990). "Quasi-public official" refers to private actors who as agents of the state owe a fiduciary duty of trust to the public even though they may also serve private interests. *See*, e.g., *Rojas v. Alexander's Department Stores*, 924 F.2d 406, 408 (2d Cir.1990) (private security guard employed by department store with arrest powers over

correctional officers acting under color of Tennessee law while engaged in the performance of exclusive and traditional governmental police power functions of detention of Tennessee prisoners, acting in their official capacity as employees of the Corrections Corporation of America (CCA),[11] and functions expressly authorized by a comprehensive Tennessee statutory scheme and delegated by the State to their employer by a correctional services contract entered into with the Tennessee Department of Corrections.[12]

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shoplifters authorized under state statute is a "quasi-public police officer" acting under color of law and subject to liability under 42 U.S.C. § 1983). *See also Jackson v. Pantazes*, 810 F.2d 426 (5th Cir.1987) (bail bondsmen effectuating an arrest as authorized under state law acts under color of law); *Warner v. Grand County*, 57 F.3d 962, 964 (10th Cir.1995) (female director of private crisis center that performed strip search at behest of law enforcement officer referred to as "auxiliary" police officer acting under color of law). Cf. *Landry v. A-Able Bonding Inc.*, 75 F.3d 200, 204-05 (1996) (Bounty hunter does not act under color of law); *Ouzts v. Maryland National Insurance Co.*, 505 F.2d 547 (9th Cir.1974) (en banc) (same).

[11] CCA headquartered in Nashville, Tennessee manages correctional facilities in Arizona, Colorado, Florida, Indiana, Kansas, Louisiana, Mississippi, New Mexico, Oklahoma, Puerto Rico, Tennessee and Texas. CORRECTIONS CORPORATION OF AMERICA, 1995 ANNUAL REPORT at 14-15.

[12] T.C.A. § 41-24-110 prohibits the delegation of authority to private contractors on matters related to the control and custody of inmates. The Attorney General of Tennessee has noted that "control and custody" is an exclusive power reserved to the State that cannot be delegated by contract. However "control and custody" does not require the State to administer, manage and operate the daily operation of a correctional facility. Tenn. Att'y Gen. Opin. No. 85-286 (1985).

A. 42 U.S.C. § 1983: State Action and Color of Law Requirement

The Civil Rights Act of 1871, Rev. Stat. § 1979 as amended, 42 U.S.C. § 1983 creates a statutory cause of action against "every person who, under color of any statute . . . of any State" deprives another of "rights, privileges, or immunities secured by the Constitution and laws. . . . " By fashioning a federally created right, Congress gave enforcement content to the recently enacted Fourteenth Amendment and its dual command of equal protection and due process. The purpose of the Act was to deter public officials from using the cloak of state authority to deprive individuals of their federally protected constitutional rights and to provide compensation and other relief to victims of constitutional torts whenever such deterrence fails. *Wyatt v. Cole*, 504 U.S. 158, 161 (1992); *Carey v. Piphus*, 435 U.S. 247, 254-57 (1978); *Monroe v. Pape*, 365 U.S. 167, 180 (1961).

As a threshold matter, in order for petitioners to be entitled to assert a qualified immunity defense it must initially be determined whether their conduct can be fairly attributed to the State of Tennessee making them state actors and that in doing so they acted under color of law for violation of rights secured under 42 U.S.C. § 1983. *Siegert v. Gilley*, 500 U.S. 226, 232 (1991). Whether the alleged misconduct of these quasi-public correctional officers constitutes state action may only be determined "by sifting facts and weighing circumstances [so] the nonobvious involvement of the state in private conduct be attributed its true significance." *Burton v. Wilmington Park Authority*, 365 U.S. 715, 722 (1961). Such

assessment will necessarily require a "particularized inquiry into the circumstances of each case in order to determine whether a given factual situation falls within the variety of individual-state relationship which the Fourteenth Amendment was designed to embrace." *Jackson v. Metropolitan Edison Company*, 419 U.S. 345, 359-360 (1974). Only a defendant acting under color of law may violate 42 U.S.C. § 1983 if exercising powers *"traditionally exclusively reserved to the State." Id.* at 362. (Emphasis added)

In order for this Court to find the requisite presence of state action, two general requirements must be established. First, the alleged deprivations of rights "must have been caused by the exercise of some right or privilege created by the state by a rule of conduct imposed by the state or by a person for whom the state is responsible." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982). Second, the defendant "must fairly be said to be a state actor." *Id.* In *Lugar* the Court held that conduct that is considered state action also constitutes action under color of law under 42 U.S.C. § 1983.[13] *Id.* at 935.

Thus, whenever a party invokes a statute and obtains enforcement thereof from a public official, he participates in state action and acts under color of the statute relied upon. *Id.* at 934. Furthermore, the Court's state action decision in *Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478 (1988) supports the rationale that *Lugar*

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[13] The Court held as early as *Monroe v. Pape*, 365 U.S. 167 (1961) that 42 U.S.C. § 1983 "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions." *Id.* at 187.

is not solely limited to prejudgment attachment. Under *Pope*, "when private parties make use of state procedures with overt, significant assistance of state officials, state action may be found." *Id*. 485.

Prior decisions of this Court establish that state action is present whenever government delegates to the private sector functions and powers that historically and traditionally have been governmental in nature. Thus, there must be an exercise of power delegated to a defendant by the state "which is traditionally associated with sovereignty, such as eminent domain." *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 352-353 (1974) (§ 1983 claim against private utility company rejected as provision of electricity not "traditionally exclusively reserved to the State"); *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 176-77 (1972) (state action is present when it can be said that State and private actor in realistic sense engage in joint venture or partnership).

In *West v. Atkins*, 487 U.S. 42 (1988) the Court, in an unanimous decision held that a medical physician contractually engaged by the state to provide medical care and treatment to prison inmates constitutes state action. That the physician was not a state employee, but rather rendered professional services under a personal service contract was of no consequence as the physician's conduct in treating North Carolina state prison inmates was "fairly attributed to the State," *United States v. Classic*, 313 U.S. 299, 326 (1941); *Monroe v. Pape*, 365 U.S. 167, 187 (1961), and thus was a "person who may fairly be said is a state actor" and his conduct was "chargeable to the State." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937, 941 (1982).

It is the physician's *function* within the state system, *not* the precise terms of his employment, that determines whether his actions can be fairly attributed to the State. Whether a physician is on the state payroll or is paid by contract, the dispositive issue concerns the relationship among the State, the physician, and the prisoner. Contracting out prison medical care does not relieve the State of its constitutional duty to provide adequate medical treatment to those in custody, and it does not deprive the State's prisoners of the means to vindicate their Eighth Amendment rights. The State bore an affirmative obligation to provide adequate medical care to West; the State delegated that function to respondent Atkins; and respondent voluntarily assumed that obligation by contract.

West v. Atkins, supra, at 55-56. (Emphasis added)

It is clear from the Court's analysis in *West* that it was of no legally significant consequence that the physician did not perform professional services exclusively for the state. "It is the physician's *function* while working for the State, not the amount of time he spends in performance of those duties or the fact that he may be employed by others to perform similar duties, that determines whether he is acting under color of state law." *Id* at 55. This is so because it is the State that has a constitutional obligation to provide prisoners in its charge with adequate medical care as inmates can only rely on the State to provide for their medical needs. *Estelle v. Gamble*, 429 U.S. 97, 103 (1976). Thus, once the government entrusts one of its traditional and exclusive governmental public functions to a private person, the private actor's conduct will be treated as state action thereby subjecting the private

party to liability under 42 U.S.C. § 1983. In contrast, the mere significance of the governmental function that is undertaken by private actors is not enough upon which to find state action. In order for state action to be found, the function performed must be historically, uniquely and exclusively governmental in nature. *Rendall-Baker v. Kohn*, 457 U.S. 830, 841 (1982) (acts of private contractors performing educational functions on behalf of state, not exclusive and do not become acts attributed to the state even by reason of their significance). *See also, NCAA v. Tarkanian*, 488 U.S. 179, 195-96 (1988) (state university's adoption of private NCAA regulations did not render NCAA as state actor); *San Francisco Arts Athletics v. U.S. Olympic Committee*, 483 U.S. 522, 547 (1987) (insufficient nexus between federal government and USOC's refusal to permit nonprofit association to use the word "Olympic"); *Blum v. Yaretsy*, 457 U.S. 991, 1004-05 (1982) (mere approval or acquiescence to the initiatives of private parties insufficient to justify finding of state action). Cf. *Flagg Brothers Inc. v. Brooks*, 436 U.S. 149, 172 n.8 (1978) (Stevens, J. dissenting) (maintenance of police force a uniquely governmental function and delegation of police power to private party entails state action). Thus, liability under 42 U.S.C. § 1983 cannot be avoided simply because the unique and exclusive public function is privatized away by contract to a private actor.

Finally, as Tennessee law permits private corporations to own, operate and manage self-contained private prison communities, and not unlike any "company town" that eschews the fundamental rights of its inhabitants, state action will be present under classic public function analysis. *Marsh v. Alabama*, 326 U.S. 501, 509 (1946) (state

law which permits private ownership of "company town" to prevent distributing literature to migrant farmworkers under state trespass law violates first and fourteenth amendments); *Illinois Migrant Council v. Campbell Soup*, 519 F.2d 391 (7th Cir.1975); *Petersen v. Talisman Sugar Corp.*, 478 F.2d 73 (5th Cir.1973). State action is present as these quasi-public correctional officers are "private individuals . . . endowed by the State with powers or functions governmental in nature, . . . they become agencies of the state and subject to its constitutional limitations." *Evans v. Newton*, 382 U.S. 296, 299 (1966).

In sum, by "sifting the facts and weighing the [unique and particular] circumstances" of this case it is apparent that state action is present under a public function analysis and that the petitioners acted under color of law. These petitioners, quasi-public correctional officers, provide even greater traditional correctional functions than the state contracted prison physician in *West*. The State has delegated vital correctional services to them which as sovereign it is required to provide to inmates under its ultimate dominion, control, oversight, regulation and power of state authority.[14] By enactment of the

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[14] T.C.A. § 41-24-102 (Pet. App. 50) provides that correctional services include classification of inmates, education, training, recreational and religious activities, food services, medical services, counseling, special treatment programs, custody of inmates and security. Under T.C.A. § 41-24-111 (Pet. App. 59-60) all existing provisions of Tennessee law governing prisons shall apply to privately managed facilities. Under T.C.A. § 41-24-109 (Pet. App. 59) the Tennessee Commissioner of Corrections monitors privately managed prisons to ensure compliance with state and federal law as well as oversight by the Tennessee legislature.

"Private Prison Contracting Act of 1986" T.C.A. § 41-24-101 et seq., the State of Tennessee has by contract clothed and entrusted these petitioners, quasi-public officials,[15] and their employer the Corrections Corporation of America, as agents of the State with broad delegated powers uniquely and exclusively the function of the sovereign that can only be carried out by the State.

B. Public Policy: Constitutional Torts and Qualified Immunity

The modern immunity decisions of this Court begin with *Tenney v. Brandlove*, 341 U.S. 367 (1951). In *Tenney* the Court considered for the first time whether a state legislator could assert absolute immunity from suit arising under 42 U.S.C. § 1983. The Court held that legislators where entitled to immunity from civil damage actions as the common law clearly recognized the privilege to be free of liability when acting "in the sphere of legitimate legislative activity." *Id.* at 376.

In *Pierson v. Ray*, 386 U.S. 547 (1967), the Court held that law enforcement officers are entitled to qualified immunity from suit even when they act pursuant to a statute subsequently held unconstitutional. The Court provided law enforcement officers qualified immunity just as the defense of good faith and probable cause was

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[15] The Tennessee courts have long-recognized the status of a "quasi-public official". *Mayes v. Bailey*, 352 S.W.2d 220, 223 (Tenn.1961); *McKenna v. Sumner County Bd. of Education*, 574 S.W.2d 527, 531 (Tenn.1978).

available to police officers in a common law action for false arrest and imprisonment. *Id.* at 555-57.

In *Scheur v. Rhodes*, 416 U.S. 232 (1974), the Court in recognizing qualified immunity for an Ohio governor and other state officials set forth the rationale for the common law immunity doctrine:

> 1) the injustice, particularly in the absence of bad faith, of subjecting to liability an officer who is required, by the legal obligations of his position, to exercise discretion; 2) the danger that the threat of such liability would deter his willingness to execute his office with decisiveness and the judgment required by the public good.

Id. at 240.

Following *Scheur* subsequent decisions of this Court emphasize that the public interest would be harmed if officials are deterred from the effective performance of core and vital state public functions to the threat of personal liability under 42 U.S.C. § 1983. These decisions uniformly establish that public officials performing vital discretionary executive and administrative functions enjoy qualified immunity from personal liability in the performance of their duties. *Wood v. Strickland*, 420 U.S. 308 (1975) (public school officials); *O'Connor v. Donaldson*, 422 U.S. 563 (1975) (state mental health administrators); *Davis v. Scherer*, 468 U.S. 183 (1984) (state highway officials) and of particular significance here state and federal prison officials. *Procunier v. Navarette*, 434 U.S. 555 (1978); *Cleavinger v. Saxner*, 474 U.S. 193 (1985).

Finally, in *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982), the Court amplified on the public policy considerations underlying the doctrine of qualified immunity.

> [I]t cannot be disputed seriously that [1983] claims frequently run against the innocent as well as the guilty at a cost not only to the defendant officials, but to society as a whole. These costs include the expense of litigation, the diversion of official energy from pressing public issues and the deterrence of able citizens from acceptance of public office.

Under *Harlow*, resolution of immunity questions necessarily "requires a balance between the evils inevitable in any available alternative." In cases which allege abuse of power by a public officer "an action for damages may offer the only realistic avenue for vindication of constitutional guarantees." *Id.* at 813-14.

When determining whether a particular public official should be afforded qualified immunity, this Court has consistently adopted a functional approach to the immunity question. The Court noted that immunity from suit is not simply awarded to one holding public office but rather derives from the performance of important core governmental functions. *Harlow*, at 812-813. In order for a state actor to claim an immunity from 1983 liability one must demonstrate that "the responsibilities of his office embraced a function so vital as to warrant immunity at common law" and that "he was discharging the protected function when performing the act for which liability is

asserted."[16] *Id.* Thus any public official acting in the course of official duties that require the exercise of significant discretionary powers and vital functions attendant to the performance of executive and administrative responsibilities are afforded qualified immunity from suit under 42 U.S.C. § 1983. Ultimately any justification for recognizing immunity turns on the "*functions* it protects and serves, not by the persons to whom it attaches." *Forrester v. White*, 484 U.S. 219, 224 (1988). (Emphasis added).

In sum, once a public official adequately demonstrates that he has acted out a significant discretionary executive or administrative function related to the alleged deprivation qualified immunity should attach for this Court has "been unwilling to complicate qualified immunity analysis by making the scope or extent of immunity turn on the precise nature of various duties or the precise character of the particular rights alleged to have been violated." *Anderson v. Creighton*, 483 U.S. 635, 643 (1987). *Anderson* eliminates the need to compare the degree of qualified immunity to be afforded a public official to the amount of discretionary power exercised by that individual.

Ultimately, qualified immunity seeks to reconcile and balance important and competing societal interests. One is the public interest as embodied by congressional policy in 42 U.S.C. § 1983 to compensate victims for violation of federally protected rights at the hand of abusive public

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[16] The Court has held that qualified immunity is an affirmative defense and the burden of pleading it rests with the defendant. *Gomez v. Toledo*, 446 U.S. 635, 640 (1980).

officials. *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982) (when government officials abuse their office damage actions may be the only realistic avenue for vindication of constitutional guarantees). The other is the compelling interest of limiting litigation against public officials that entail social costs that the fear and exposure to personal liability and vexatious and insubstantial civil rights litigation will unduly inhibit officials from serving or cause them to be unwilling to perform their public responsibilities with the decisiveness and the judgment required by the public function. *Scheur v. Rhodes*, 416 U.S. 232, 240 (1974); *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982); *Anderson v. Creighton*, 483 U.S. 635, 645 (1987).

C. Qualified Immunity is Available to Quasi-Public Correctional Officers Performing Historical and Traditional Police Power Functions Exclusively Reserved to the Sovereign and Delegated to Private State Actors Under State Law and Contract

1. *Wyatt v. Cole* and Qualified Immunity

In *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 942 (1982), the Court held that a private party initiating state attachment procedures later successfully challenged as unconstitutional, acts under color of state law and is liable for the deprivation of property under 42 U.S.C. § 1983. However, in a footnote, the Court expressly declined to "reach the question of the availability of [qualified immunity] to private individuals at this juncture." *Id.* at 942 n.23. That issue was finally decided by the Court in a narrowly confined decision in *Wyatt v. Cole*, 504 U.S. 158 (1992).

In *Wyatt*, the Court considered the qualified immunity issue left open in *Lugar*; "whether private defendants charged with 42 U.S.C. § 1983 violations are entitled to qualified immunity from suit." *Id.* at 159. In *Wyatt*, the Court noted:

> The question on which we granted certiorari is *a very narrow one*: "[W]hether private persons, who conspire with state officials to violate constitutional rights, have available to them the good faith immunity applicable to public officials." The precise issue encompassed in this question, and the *only* issue decided by the lower courts, is whether qualified immunity, . . . is available for private defendants invoking a state replevin, garnishment or attachment statute.

Id. at 168. (Emphasis added)

In *Wyatt*, the Court answered the question when it held that qualified immunity is not available to defendants acting purely as private parties for personal gain invoking unconstitutional statutory seizure remedies. *Id.* 168-169. In reaching its conclusion the Court noted "that the rationales mandating qualified immunity for public officials are not applicable to private parties." *Id.* at 167. In so holding the Court noted:

> Unlike school board members, or police officers, or Presidential aides, private parties hold no office requiring them to exercise discretion; nor are they principally concerned with enhancing the public good. Accordingly extending qualified immunity to private parties would have no bearing on whether public officials are able to act forcefully and decisively in their jobs

> or whether qualified applicants enter public service. Moreover, unlike with government officials performing discretionary functions they will not be unduly impaired if private individuals are required to proceed to trial to resolve their legal disputes. In short, the nexus between private parties and the historic purposes of qualified immunity is simply too attenuated to justify such an extension of our doctrine of immunity.

Id. at 168. (Citations omitted)

With respect to the unavailability of qualified immunity to purely private persons that perform no discretionary function for the public good the Court reasoned that there was no common law immunity that Congress intended to include under 42 U.S.C. § 1983, as the most analogous torts at common law recognized actions arising for abuse of process against private parties. Even if at common law such actions could be defeated by demonstrating that the defendants had acted without malice and with probable cause, and even if such rationale supported a good faith defense under 42 U.S.C. § 1983, such a rationale would not entitle private defendants to an objectively determined qualified immunity standard under *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), immediately appealable under *Mitchell v. Forsyth*, 472 U.S. 511, 528-30 (1985).

In sum, the reason for according objectively determinable qualified immunity to public officers is based not only on the existence of a good faith defense at common law, but also for special and unique public policy considerations implicated in suing public officials where qualified immunity acts to safeguard and relieve public

servants from vexatious litigation, and thereby promoting and furthering the public interest. In *Wyatt*, while recognizing that principles of fairness and equity might offer some protection to private citizens who rely unsuspectingly on state laws that they had no reason to believe are invalid, the Court nonetheless held that the nexus between private parties and the historical purposes of qualified immunity was too attenuated to justify such an extension of the doctrine. The Court noted that such an extension would have no bearing on whether public officials were able to act forcibly or decisively in their official duties, or on whether public officials would be deterred from entering public service. Since private litigants hold no office requiring the exercise of discretionary functions, they are not principally concerned with furthering the public good, and the public interest would not be impaired if private litigants were compelled to proceed to trial to resolve their legal controversies. *Wyatt, supra* at 167-169.

2. Post-Wyatt Lower Court Decisions

Since this Court's 1992 decision in *Wyatt*, the First, Seventh, Tenth and Eleventh Circuits have construed this Court's holding narrowly, limiting its application to the "precise issue" that qualified immunity is not available as a defense in cases where private parties act under color of law in pursuit of their own narrow private interests unrelated to the performance of a governmental function. In contrast, the Sixth Circuit rejected this approach and read *Wyatt* as creating a broad per se rule that *"private parties*

are not eligible for immunity from suit." 88 F.3d at 421. (Pet. App. 21) (Emphasis added)

The circuits in conflict with the Sixth Circuit draw factual and policy distinctions in two categories of cases when resolving whether a private defendant acting under color of law should enjoy the availability of a qualified immunity defense under 42 U.S.C. § 1983. Thus, private parties acting under color of law and fulfilling a traditional governmental discretionary function at the behest of the sovereign either under contract, agreement, grant or pursuant to a court mandated order are entitled to assert a qualified immunity defense otherwise recognized as available to public officers acting in a similar capacity. *Rodriques v. Furtado*, 950 F.2d 805, 815 (1st Cir.1991) (private physician who performed vaginal cavity search pursuant to valid search warrant entitled to qualified immunity); *Frazier v. Bailey*, 957 F.2d 920, 928-929 (1st Cir.1992) (private social workers who contracted with state to provide statutorily required counseling and investigative services of child abuse are entitled to qualified immunity); *Sherman v. Four County Counseling Center*, 987 F.2d 387, 405-406 (7th Cir.1993) (qualified immunity applies to private medical institution involved in emergency court ordered involuntary detention and treatment of plaintiff); *Leeks v. Cunningham*, 997 F.2d 1330, 1333 (11th Cir.), *cert. denied*, 510 U.S. 1014 (1993) (private physician under contract to provide medical services to county jail entitled to qualified immunity); *Williams v. O'Leary*, 55 F.3d 320, 323-24 (7th Cir.), *cert. denied*, 116 S.Ct. 527 (1995) (physician whose private employer held state contract to provide medical care to state prison system entitled to qualified immunity); *Warner v. Grand*

County, 57 F.3d 962, 966 (10th Cir.1995) (private crisis center director conducting strip search at police officer's request entitled to qualified immunity); *Eagon v. Elk City*, 72 F.3d 1480, 1489 (10th Cir.1996) (private person charged with power pursuant to city council resolution to grant or deny applications for Christmas displays in city park entitled to qualified immunity).

On the other hand, private parties acting under color of law for purely private financial gain or solely for narrow self-interest as in *Wyatt*, entirely unrelated to the performance of a traditional public function, are not entitled to qualified immunity. *Burrell v. Board of Trustees of Ga. Military College*, 970 F.2d 785, 787 (11th Cir.1992), *cert. denied*, 507 U.S. 1018 (1993) (private defendants acting in concert with public officials of military college to terminate plaintiff's employment because of husband's public criticism of institution not entitled to qualified immunity); *Howerton v. Gabica*, 708 F.2d 380, 385 n.2 (9th Cir.1983) (private landlord who enlisted services of police officers to assist in unlawful eviction not entitled to qualified immunity); *Felix de Santana v. Velez*, 956 F.2d 16, 20 (1st Cir.), *cert. denied*, 506 U.S. 817 (1992) (private party who conspired with prosecuting attorney to indict a coworker for perjury not entitled to qualified immunity); *Vector Research, Inc. v. Howard & Howard Attorneys, P.C.*, 76 F.3d 692, 698-99 (6th Cir.1996) (private attorneys assisting law enforcement in unlawful search and seizure not entitled to qualified immunity).

In rejecting the availability of the defense of qualified immunity to petitioners Richardson and Walker, quasi-public correctional officers employed by CCA under state contract authorized by the Tennessee Commissioner of

Corrections, the Sixth Circuit offered the following policy rationale which conflicts with the several circuits that have construed *Wyatt* narrowly by limiting this Court's holding only to those factual circumstances where a private person acts under color of law to promote an exclusive private interest:

> The public undoubtedly has an interest in maintaining secure and efficient correctional facilities. . . . Suffice it to say that it is beyond peradventure that correctional officers working for a private, for-profit corporation that has contracted with the state are serving a public interest by operating Tennessee's prison facilities.
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> Nonetheless, we also recognize that, while privately employed correctional officers are serving the public interest by maintaining a correctional facility, they are not motivated by a desire to further the interests of the public at large. Rather, as employees of a private corporation seeking to maximize profits, correctional officers act, at least in part, out of a desire to maintain the profitability of the corporation for whom they labor, thereby insuring there own job security. While this arguably did not vitiate furtherance of the public interest, it upsets the balance qualified immunity seeks to establish "between compensating those who have been injured by official conduct and protecting government's ability to perform its traditional public functions." *Wyatt*, 504 U.S. at 167. The balance struck by qualified immunity, at least implicitly contemplates a government actor

> acting for the good of the state, not a private actor for the good of the pocketbook.

88 F.3d at 424-25, (Pet. App. 15-16).

The Sixth Circuit's decision, admittedly relies on an "implicitly" broad reading of *Wyatt* which is unreasonable and is clearly in conflict with applicable decisions of the First, Seventh, Tenth and Eleventh Circuits which have considered the precise question presented herein. Circuit Judge Nelson, in his separate opinion concurring in the judgment, noted that he was constrained by binding Sixth Circuit precedent from holding that petitioners were entitled to qualified immunity, which has adopted a per se rule *"that private parties are not eligible for immunity from suit."* *Duncan v. Peck*, 844 F.2d 1261, 1264 (6th Cir.1988); *Vector Research, Inc. v. Howard & Howard, P.C.*, 76 F.3d 692, 698-99 (6th Cir.1996):

> If I believed that we were free to dispose of this appeal on public policy grounds, my vote would be to remand the case with instructions to dismiss. . . . The notion that there is likely to be a meaningful difference between the behavior of a correctional officer whose paycheck comes from the State of Tennessee and the behavior of a correctional officer whose paycheck comes from the Corrections Corporation of America is a notion, it seems to me, that bespeaks a vaguely utopian view of the virtues of those that feed at the public trough. This view is not one I share. If it is sound public policy to offer qualified immunity from suit to correctional officers employed by a public corporation, I think it is equally sound policy to offer qualified immunity to the officer employed by a private corporation, assuming both employees

> perform identical public functions. . . . In the post-*Wyatt* era, I imagine, most of our sister circuits will probably continue to make qualified immunity available to private defendants who perform governmental functions for governmental purpose. . . . Given *Duncan*, however, I do not believe the qualified immunity option is currently open to our panel. . . . *This holding may be too broad*, but our circuit precedent rule makes it binding on us here.

88 F.3d at 425-26. (Pet. App. 19-22) (Emphasis added)

3. Availability of Qualified Immunity to Quasi-Public Officials After *Wyatt*

In *Procunier v. Navarette*, 434 U.S. 555, 561-562 (1978) the Court, without reference to any common law inquiry, based its decision that state correctional officers are entitled to qualified immunity solely on public policy considerations. Historically, the Court justified the extension of immunity to a particular public official by looking to the common law existing at the time of the passage of the Civil Rights Act of 1871, in addition to public policy considerations relevant to the particular function performed by the public officeholder. *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 259 (1981).

Thus prior to *Procunier* the immunity decisions of the Court were "predicated upon a considered inquiry into the immunity historically accorded the relevant official at common law and the [public policy] interests behind it." *Imbler v. Pachtman*, 424 U.S. 409, 421 (1976). In *Procunier* Justice Stevens noted in dissent that he had no "quarrel with the extension of qualified immunity to all state

agents," and concluded that a "considered inquiry" into the common law has "now been abandoned" by the Court. *Id.* at 568-569. Justice Steven's observation regarding the abandonment of a common law analysis is supported by Justice Scalia's conclusion that the Court has "completely reformulated qualified immunity along principles not at all embodied in the common law." *Anderson v. Creighton*, 483 U.S. 635, 645 (1987). Thus this Court needs no considered common law inquiry for granting qualified immunity to these quasi-public correctional officers as it now is clear from decisions of this Court that all public officials that perform vital discretionary governmental functions enjoy qualified immunity from suit. *See also, Heck v. Humphrey*, 512 U.S. 477, 495-506 (1994) (Souter, J. joined by Blackmun, Stevens and O'Connor, JJ. concurring in the judgment) (discussing import of common law analysis in § 1983 claims).

Yet even if a common law inquiry is required then it is clear that correctional officers possess broad police power functions under Tennessee law[17] of custodial

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[17] T.C.A. § 4-3-609 (Exercise of police powers by correctional officers):

(a) Those employees of the department of correction as the commissioner shall designate who have been trained in the use of firearms are vested with the powers and authority of peace officers, including the power to carry weapons, and shall exercise such powers and authority only: (1) While on the grounds of the institutions under the supervision of the department; (2) While transporting inmates between institutions; (3) While pursing escapees from such institutions; or (4) While aiding local law enforcement officials in the search and apprehension of escapees.

detention, security, physical restraint and search and seizure as exercised by other peace officers that historically enjoyed qualified immunity at common law. *Pierson v. Ray*, 386 U.S. 547, 555-57 (1967) (defense of good faith and probable cause which is available to police officers in common law action for false arrest and imprisonment is also available under § 1983). These law enforcement powers and functions of prison officials are well known to the Court.

> Prison administrators are responsible for maintaining internal order and discipline, for securing their institutions against unauthorized access or escape, and for rehabilitating, to the extent that human nature and inadequate resources allow, the inmates placed in their custody, the Herculean obstacles to effective discharge of these duties are too apparent to warrant explication.

Procunier v. Martinez, 416 U.S. 396, 404-05 (1974).

In *West v. Atkins*, 487 U.S. 42, 55-56 (1988) the Court held that a contract physician providing medical care and treatment to prisoners within the state correctional system acted under color of law as the functions performed by the physician and not the precise terms of employment determines whether actions of the defendant can be fairly attributed to the state. Although the qualified immunity issue was not before the Court in *West*, presumably the prison contract physician would be entitled

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(b) The commissioner shall also establish internal procedures concerning appropriate exercise of the powers vested by this section.

under *Procunier v. Navarette* to qualified immunity to the same extent that privilege is afforded to other prison personnel that perform like discretionary functions given the long-standing policy rationales advanced by the Court.[18] *Forrester v. White*, 484 U.S. 219, 227 (1988) (immunity justified by the functions it protects and serves, not by the person to whom it attaches); *Cleavinger v. Saxner*, 474 U.S. 193, 201 (1985) (immunity flows not from rank or title or location within the government, but from the nature of the responsibilities of the individual involved); *Briscoe v. LaHue*, 460 U.S. 325, 342 (1983) (immunity analysis rests on functional categories not on the status of the defendant); *Butz v. Economou*, 438 U.S. 478, 503 (1978) (administrative hearing examiner is functional equivalent to a judge). Given the limited scope of *Wyatt*, it cannot be fairly read for the principle that private defendants can never assert a qualified immunity defense. These quasi-public correctional officers employed under state contract as authorized under state law and whose duties are identical to their corresponding public sector officials makes

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[18] Applying the functional analysis approach in *West* the several circuits that have considered whether private health care professionals acting under government contract or direction are entitled to qualified immunity uniformly have had little difficulty extending the privilege under the objective test advanced by the Court in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). *See Dolihite v. Maughon*, 74 F.3d 1027, 1044 (11th Cir.1996); *Leeks v. Cunningham*, 997 F.2d 1330, 1333 (11th Cir.1993); *Warner v. Grand County*, 57 F.3d 962, 966 (10th Cir.1995); *Williams v. O'Leary*, 55 F.3d 320, 323-24 (7th Cir.1995); *Frazier v. Bailey*, 957 F.2d 920, 928-29 (1st Cir.1992); *Rodriques v. Furtado*, 950 F.2d 805, 815 (1st Cir.1991).

it difficult to draw any meaningful substantive distinction relevant to qualified immunity analysis between these petitioners and the state and federal correctional officials in *Procunier v. Navarette* and *Cleavinger v. Saxner.*

It is well settled by the Court that the availability of qualified immunity to a particular state actor is directly related to the function a defendant fulfills rather than the actual position held. *Brisco v. LaHue*, 460 U.S. 325, 342 (1983) (immunity analysis rests on functional categories not on the status of the defendant). Thus when the function a quasi-public correctional officer serves ostensibly approximates the function a state employed correctional officer performs, it necessarily follows that the same policy considerations which provide qualified immunity to the public officers support the extension of qualified immunity to these petitioners. Thus this Court's holding in *Procunier v. Navarette* that affords qualified immunity in actions brought under 42 U.S.C. § 1983 should be applied with equal force to quasi-public correctional officers that perform vital and important discretionary state functions.

In extending qualified immunity to federal correctional officials the Court appropriately acknowledged the unique complexities and difficulties inherent in the management and operation of correctional facilities that make the exercise of discretion so essential and unique to the prison context.

> The administration of a prison is a difficult undertaking at best, for it concerns persons many of whom have demonstrated a proclivity for antisocial, criminal, and violent conduct . . . [Many] inmates do not refrain from harassment and intimidation. The number of

> non-meritorious cases that come into this Court's notice is evidence of this.

Cleavinger v. Saxner, 474 U.S. 193, 203 (1985)

The functional analysis approach employed by the Court when applied to this case inescapably ordains that qualified immunity should be extended to quasi-public correctional guards performing unique police powers of incarceration of convicted felons under state custody exclusively reserved to the sovereign. *Rendall-Baker v. Kohn*, 457 U.S. 830, 842 (1982) (the relevant question is not whether a private group is serving a "public function" but whether the function performed has been "the *exclusive* prerogative of the state"). *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 352-353 (1974). The traditional and exclusive public function delegated by the State of Tennessee by privatizing correctional services under the Private Prison Contracting Act of 1986, T.C.A. § 41-24-101 et seq. by contract to CCA and in turn to its quasi-public correctional officers similarly should turn on an analysis of the scope and nature of the function actually performed by petitioners and not whether one holds the status of government employee as opposed to private contract employee when the identical functions are conducted under color of law for the benefit of the public interest.

Quasi-public correctional officers acting under color of law in the performance of exclusive public functions delegated to them under state law and contract which require them to undertake the same discretionary public functions as their state and federal counterparts afforded

qualified immunity in *Procunier v. Navarette* and *Cleavinger v. Saxner* for the public benefit as performed by these quasi-public correctional officers warrants their entitlement to assert the defense of qualified immunity. Petitioners perform the identical discretionary functions in their daily interactions with violent criminal offenders, such as maintaining order and security within the facility and are required to make the same decisions in a high risk environment for the benefit of the public interest just as state correctional officers working at prisons operated by the state. Nor is there any allegation contained in the complaint that these petitioners conspired with government officials for parochial financial gain or self-interest to act beyond the boundaries of the law or the scope of their duties, which permits but does not require them to act in a certain manner. *Dennis v. Sparks*, 449 U.S. 24, 25 (1978) (action under § 1983 available against private co-conspirators of state trial judge that alleged to have corruptly issued an injunction even though judge has absolute immunity).

Denying qualified immunity to these quasi-public correctional officers employed by CCA under state contract furthers unsound policy accenting form over substance. Nothing in *Wyatt* remotely suggests that the Court intended to abandon its long-standing functional analysis approach in qualified immunity cases, nor does it appear that the *Wyatt* Court remotely intended to establish a per se bright line rule implicated by the Sixth Circuit's decision that private persons acting under color of law may never be shielded by qualified immunity.

In sum, the South Central Correctional Center is a prison facility operated and managed by the Corrections

Corporation of America under color of law, providing correctional services under state contract as authorized by Tennessee law as an innovative *experimental* program, whose performance standards and qualitative operations are pervasively regulated and supervised by the Tennessee Commissioner of Corrections, the Attorney General, and both houses of the Tennessee legislature under T.C.A. § 41-24-104. *Garcia v. San Antonio Metro. Authority*, 469 U.S. 528, 543-46 (1985) (concluding that the distinction between "traditional" governmental functions and proprietary functions was both unworkable in practice and unsound in principle, since it is inconsistent with federalism's basic tenet that states should be free to *experiment* with "any activity that their citizens choose for the commonweal").

These petitioners, in their capacity as quasi-public correctional officers employed by CCA (a company that but for the grace of state authorized privatization contracts would cease to operate altogether) for the provision of correctional services that can only be delegated to private sector service providers by government agencies that exclusively hold custodial police powers of detention, and other important correctional functions delegated to them by the State of Tennessee perform functions identical to state employed correctional officers. As custodial detention of an individual is an exclusive power reserved to the sovereign subject to certain limitations embodied in the Due Process Clause of the Fourteenth Amendment, CCA's quasi-public correctional officers may only provide correctional services as a "partner" or "joint venturer" with the Tennessee Department of Corrections under contract as expressly authorized by

Tennessee law. *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 176-77 (1972).

The Court should afford qualified immunity to quasi-public correctional officers in furtherance of the public interest, as it did for the state prison officials in *Procunier v. Navarette*, 434 U.S. 555 (1978) and federal prison officials in *Cleavinger v. Saxner*, 474 U.S. 193 (1985). The dispositive issue presented here turns on the functional "relationship among the state, the [private actor], and the prisoner," *West v. Atkins*, 487 U.S. 42, 55-56 (1988). Given the functional relationship between the State of Tennessee, the petitioners as state actors operating as prison officials under state delegated authority and respondent as state prisoner warrants an extension of qualified immunity to these quasi-public correctional officers in suit arising under 42 U.S.C. § 1983. The policy concerns that litigation costs money and diverts public servants' energy from their public responsibilities and duties, and that the threat of liability deters those considering public service will "dampen the ardor of all but the most resolute, or the most responsible public officials, in the unflinching discharge of their duties," applies to the functions performed by CCA's correctional officers in their day to day discretionary responsibilities and high risk interactions with inmates that place them in harm's way unlike any other public servant. *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982).

The burden of litigation against these quasi-public correctional officers coupled with the security and safety concerns carries with it the same risks and social costs as those faced by federal and state correctional and other law enforcement officers, and diverts their energies from

their duties as their government counterparts. While it is true that CCA did not contract to provide correctional services for the State of Tennessee simply for benevolent purposes, nonetheless any litigation expenses will ultimately be passed on to the State and the taxpayers as part of the cost of doing business. Furthermore the specter or threat of litigation will also deter those who might otherwise seek employment opportunities with CCA, and by CCA itself when it considers contracting their services with a governmental agency. There is no plausible reason to believe that the threat of personal liability suits brought under 42 U.S.C. § 1983 would have any less "dampening" effect on CCA correctional officers in the discharge of their discretionary duties than it would have on state and federal correctional officers.

SCCC is a prison managed and operated by CCA solely on behalf of the State of Tennessee, and the public has a significant interest in having those individuals that serve in these facilities do so free of the threat of unwarranted litigation. It furthers the public interest that qualified contractors such as CCA and these petitioners, quasi-public correctional officers not be discouraged from performing their important and essential governmental discretionary functions while employed at SCCC due to the ever present exposure to personal liability suits.

If the Sixth Circuit decision is permitted to stand, it could seriously erode the willingness of the several states, its political sub-divisions and the federal government to engage private contractors in the joint development of cooperative experimental programs in furtherance of the public good. This is particularly so as the society enters a period of government downsizing

and expanded reliance on the private sector to perform a variety of traditional public functions. Contrary to the Sixth Circuit's decision herein, extending qualified immunity to quasi-public correctional officers not only appropriately strikes a fair and proper balance between the strong societal interest of compensating individuals for unconstitutional deprivations but at same time ensures that these correctional guards will not be deterred and inhibited from performing vital and significant governmental functions. Affording qualified immunity to this discrete and narrow class: quasi-public correctional officers, is a reasonable and appropriate application of established doctrine. Ultimately qualified immunity as it has been developed by the Court provides only the necessary protection to "all but the plainly incompetent to those who knowingly violate [clearly established] law." *Malley v. Briggs*, 475 U.S. 335, 345 (1986). As qualified immunity only protects public officials who do not violate clearly established rights, extending the protections of qualified immunity here promotes the ability of quasi-public correctional officers to carry out their vital duties and responsibilities in a decisive and responsible manner.

In denying qualified immunity to these petitioners, the Sixth Circuit argued that:

> [W]hile private employed correctional officers are serving the public interest by maintaining a correctional facility, they are not principally motivated by a desire to further the interests of the public at large. Rather as employees of a private corporation seeking to maximize profits, correctional officers act, at least in part, out of a desire to maintain the profitability of the corporation for whom they labor, thereby ensuring

> their own job security it arguably does not vitiate furtherance of the public interest, it upsets the balance qualified immunity seeks to establish "between compensating those who have been injured by official conduct and protecting government's ability to perform its traditional public functions". *Wyatt*, 504 U.S. at 167. (citation omitted) The balance struck by qualified immunity, at least implicitly, contemplates a government actor acting for the good of the state, not a private actor for the good of the pocketbook. With respect to cutting corners on constitutional guarantees, one commentator has explained that "[e]ntrepreneurial jailers benefit directly, in the form of increased profits, from every dime not spent." Note, *The Panopticon Revisited: The Problem of Monitoring Private Prisons*, 96 YALE L.J. 353, 357 (1986).

88 F.3d at 424. (Pet. App. 15-16)

The rationale offered up by the Sixth Circuit that private sector prison contractors will "cut corners on constitutional guarantees" for "the good of the pocketbook" unfairly characterizes the reality of the marketplace and is unsupported by the available empirical evidence which is to the contrary.[19] Under T.C.A.

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[19] *See*, e.g., C. Logan, *Well Kept: Comparing Quality of Confinement in Private and Public Prisons*, 83 J. Crim. L. & Criminology 577, 601 (1992). The study included 333 empirical categories designed to measure different areas regarding the quality of prison confinement. The *Logan* study concluded that private prisons outperformed state and federal prisons by substantial margins across nearly all categories.

§ 41-24-105 CCA must adhere to established constitutional norms[20] and legal standards in order to secure and maintain their contractual relationship with the State of Tennessee.[21] In 1993 pursuant to T.C.A. § 41-25-105(c) the Tennessee legislature convened a Select Oversight Committee on Corrections which studied the comparative operations of two state operated facilities along with the South Central Correctional Center operated by CCA where respondent McKnight is housed. After a two year study the Oversight Committee awarded SCCC a higher

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[20] The litigation experience of private correctional companies reveals that by 1996 not one privately operated and managed facility is operating under court order or consent decree while three-quarters of state jurisdictions have major facilities or their entire correctional system operating under court supervision. C. Thomas, *Correctional Privatization: The Issues and the Evidence*, pp. 40-41 (Frazier Institute, Toronto, Canada 1996).

[21] It is noteworthy that the South Central Correctional Center where respondent McKnight is confined is accredited by the American Correctional Association (ACA), along with 15 other additional CCA managed facilities. CORRECTIONS CORPORATION OF AMERICA, 1995 Annual Report at 14. The ACA is an independent organization that has developed objective standards and guidelines to safeguard the life, safety and health of offenders and correctional personnel. The ACA accreditation standards are the most widely recognized guidelines and cover such areas as administration, personnel, staff training, security, health care, food service, inmate supervision and physical plant. *See*, AMERICAN CORRECTIONAL ASSOCIATION, STANDARDS FOR ADULT CORRECTIONAL INSTITUTIONS (3rd Edition 1990). In 1989 only 26% of federal and state managed correctional facilities were accredited by the ACA. Logan, *supra* at 598.

overall performance rating than the two state operated facilities.[22]

Qualified immunity has never been based on a public official's benevolent desire to promote and serve the public good but instead that the public interest is advanced if those individuals that perform vital and important governmental functions are able to act decisively in their official capacity free of the threat of unwarranted and distracting vexatious litigation. Nevertheless, the fact is that any quasi-public correctional officer who intentionally, knowingly and deliberately violates the clearly established constitutional rights of the inmates placed in their custodial charge to increase the pocket-book of the corporate master they serve would not enjoy the protection of qualified immunity. *Harlow v. Fitzgerald*, 457 U.S. 800, 815-16 (1982). Extending qualified immunity to these quasi-public correctional officers advances the public good in the same manner as it does with federal and state employed correctional officers. This is so as qualified immunity furthers and promotes efficient and effective discretionary performance of significant governmental functions so vital to the public interest in the hard-core context of the realities of the prison environment and encourages the retention of competent professional employees and qualified applicants seeking employment with public sector contractors such as CCA instead of

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[22] Tennessee Select Oversight Committee on Corrections, *Comparative Evaluation of Privately Managed Corrections Corporation of America Prison (South Central Correctional Center) and State Managed Prototypical Prisons (Northeast Correctional Center, Northwest Correctional Center) at pp. vii-x (Executive Summary) (February 1, 1995).*

deterring them from entering an alternative form of public service.

In the end, extending qualified immunity to quasi-public correctional officials ultimately reduces the overall cost of litigation, and along with other efficiencies, the total costs of financing and operating private correctional facilities which ultimately the public treasury and the taxpayers support. So long as qualified immunity promotes the public interest as abundantly demonstrated herein, the fact that it may also advance and benefit the corporate interests of CCA, its shareholders and employees is of no legal import on the question before the Court of whether quasi-public correctional officers should enjoy the defense of qualified immunity.

As more essential governmental services are provided by contracts and grants with the private sector rather than from the direct efforts of state agencies, the public policy considerations that accord qualified immunity to public officials should apply with the same force to quasi-public officials. This is so as there appear to be no sound public policy considerations that weigh against extending qualified immunity to any quasi-public official that exercises discretionary public functions as performed by their corresponding state actor.

VII. CONCLUSION

In conclusion, petitioners ask this Court to hold that quasi-public correctional officers who perform exclusive and vital governmental functions that require the exercise of discretion under contract with the State are entitled to

qualified immunity if a government official would have been entitled to the immunity had he performed the same function instead.

For the foregoing reasons petitioners pray the judgment of the United States Court of Appeals for the Sixth Circuit denying them qualified immunity be reversed and the matter remanded to the district court with directions to grant the petitioners' motion to dismiss this action.

Respectfully submitted,

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